**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

JAMETRIUS MCCON, DARYL D. WILLIAMS,
LARRY HENDERSON and LAMARIO HENDERSON   PLAINTIFFS

VERSUS   CASE 1:17cv77-LG-RHW

ADOLFO PEREZ and D&D EXPRESS TRANSPORT CORP   DEFENDANTS

-AND-

D&D EXPRESS TRANSPORT CORP   COUNTER-PLAINTIFF

VERSUS

DARYL D. WILLIAMS   COUNTER-DEFENDANT

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' REBUTTAL [250],
AFFIDAVIT [250-1] AND PLAINTIFFS' MEMORANDUM [251], [252]**

COME NOW the Defendants, D&D Express Transport Corp and Adolfo Perez, who

move to strike the Rebuttal [250], Affidavit in Support [250-1] and Memoranda [251], [252][1]

filed by Daryl Williams, Lamario Henderson and Larry Henderson (collectively, "Movants"),

because they go beyond the scope of Movants' original Motion to Amend [242]. In short,

arguments and supporting documents first presented in rebuttal should not be considered by the

Court. In support of this Motion, Defendants incorporate herein by reference their Memorandum

in Support and further state:

    1.   On March 19, 2018 – over seven (7) months after the deadline to file motions to

amend the pleadings passed[2] – movants filed their Motion to Amend Answer [242].

    2.   In the Motion to Amend [242], Movants claimed the admissions in the Answer

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[1] The Court has recognized that Memo [252] was a re-file. Out of an abundance of caution, Defendants include it in this Motion to Strike and their Memorandum in Support.
[2] The deadline to amend the pleadings ran on August 15, 2017. See Case Management Order "CMO" [24], pg. 4.

[15] were inadvertent,[3] and "Rule 15(a) provides that the court should freely give leave to amend when justice so requires, and this inadvertency has not caused any prejudice to the Defendants."[4] **No other legal support was given for Movants' request to amend, and no memorandum in support was filed as required by the local rules.** Defendants pointed out this deficiency in their Response [243] and Memo [244].

3.   Now, in Rebuttal [250], Movants attach the self-serving affidavit of counsel, blaming a paralegal for filing the wrong answer and claiming the "clerical error" "did not come to light until March 18, 2018" when Defendants filed their Motion for Summary Judgment.[5] The affidavit should be stricken for several reasons. First, the assertions in the affidavit were not presented with the original Motion to Amend [242], even though the information (if true) was available to counsel before filing the Motion [242]. Second, the affidavit ignores the fact that Defendants put Movants on notice of the admissions on June 2, 2017, when they filed their Answer [18] to Williams' Counter-Claim. Third, the affidavit ignores the fact that an attorney who permits office personnel to file documents on his behalf remains responsible for all documents filed with his password.[6] Fourth, the affidavit does not appear to be based on personal knowledge.

4.   While Movants could have submitted – but did not submit – such an affidavit in support of their Motion to Amend [242], such an affidavit does not explain the tardiness of filing the Motion [242], especially given **Movants were put on notice of the admission on June 2, 2017.** Instead, Movants claim Defendants' Sixteenth and Eighteenth Defenses were not sufficient to put them on notice of the admissions: such an argument cannot be reasonably sustained.

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[3] See Motion [242], ¶ 4.
[4] See Motion [242], ¶ 10.
[5] See Affidavit [250-1], ¶ 3-5.
[6] See Attorney CMECF training manual, pg. 4, found at
http://www.mssd.uscourts.gov/sites/mssd/files/forms/attorney%20cmecf%20training%20manual.pdf

5.   Additionally, Movants argue, "When applying the Fifth Circuit test for good cause to Amend the Pleadings, just as in the recent 2017 S&W Enterprises case, Plaintiffs meets said criteria,"[7] because of the amount of discovery that was conducted. This argument should be rejected for several reasons. First, the argument goes beyond the Motion to Amend [242], because the Motion [242] requested relief pursuant to Rule 15(a), while *S&W Enters.* relies on Rule 16. Second, the *S&W Enters.* case actually support Defendants' position, as it sets forth the four-part test that Movants failed to address in their Motion [242], ultimately affirming the district court's denial of a motion to amend. Third, *S&W Enters.* did not concern any amount of discovery conducted in the case.

6.   Movants also argue that "there was never a new motion to amend the pleadings deadline entered with the new scheduling order which was entered after the old deadline had passed."[8] Yet, this Court has already rejected this argument with respect to McCon and his Motion to Amend the Complaint [119].[9]

7.   In support of this Motion to Strike, Defendants incorporate herein by reference their Memorandum in Support as well as their Opposition [243] and Memorandum [244] .

WHEREFORE, PREMISES CONSIDERED, Defendants, D&D Express Transport Corp and Adolfo Perez, request this Honorable Court strike Movants' Rebuttal [250], Affidavit [250-1] and Memoranda [251], [252] and thereafter deny Movants' Motion to Amend Answer to Complaint [242].

Respectfully submitted, this 4th day of April, 2018.

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[7] See Rebuttal [250], pg. 1.
[8] See Rebuttal [250], pg. 2.
[9] See Order [168].

D&D EXPRESS TRANSPORT CORP
and ADOLFO PEREZ

By: */s/ Kathryn Platt*
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CERTIFICATE OF SERVICE

I, Kathryn Breard Platt, one of the attorneys for Defendants, D&D Express Transport

Corp and Adolfo Perez, do hereby certify that I have this date served the above and foregoing

Motion upon all counsel of record and interested persons via the Court's ECF filing system.

So certified, this 4th day of April, 2018.

    /s/ Kathryn Platt
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